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# Political Strategy 101: Masquerading Moral Legislation as Health Care

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It can be argued that, at the root of most laws, we are either proscribing or encouraging an act based upon our own moral beliefs. There is perhaps no better example of this proposition than our abortion laws and the debate surrounding them. The past twenty years have seen a rise in the regulation of abortion through informed consent statutes.[1] While advocates of these strict abortion laws often tout them as ensuring a higher level of medical care both to the pregnant woman and to the unborn child, the specific requirements of these regulations frequently implicate few—if any—medical benefits.[2] It is readily apparent that such laws are much more deeply rooted in morality than medicine. But if they are about morality—which the State may lawfully regulate under its police power[3]—why are they sold as health care reform? The answer seems rather clear: political policy.

A recent Texas law and subsequent court case challenging it highlight this issue. Texas House Bill 15, amending the 2003 Texas Woman's Right to Know Act, went into effect on September 1, 2011.[4] The amendments require, among other things, that a pregnant woman seeking an abortion must have a sonogram and that a physician must give her a "verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs."[5] A woman may decline to receive an explanation of the sonogram images only if: 1) her pregnancy is the result of rape or incest, 2) she is a minor and obtaining an abortion through judicial bypass, or 3) "the fetus has an irreversible medical condition or abnormality, as previously identified by reliable diagnostic procedures and documented in the woman's medical file."[6]

Physicians and abortion providers sued the commissioner of the Texas Department of State Health Services and the executive director of the Texas Medical Board, seeking a preliminary injunction.[7] The district court enjoined the defendants from forcing physicians to give a verbal explanation of the sonogram images.[8] On appeal, the Texas Court of Appeals vacated the district court's preliminary injunction and remanded the case.[9]

The Texas Court of Appeals noted that these amendments were "intended to strengthen the informed consent of women who choose to undergo an abortion."[10] But a simple reading of the amendments quickly reveals that this is false.

If these amendments were truly about informed consent, what do the aforementioned exceptions mean? They mean that the drafters of this law believed that victims of rape and incest, minors, and women with abnormal fetuses have less of a right to be informed about medical procedures than do other women.

But it is hard to imagine any circumstances under which the drafters of these amendments truly believed that the women who fall into these categories should receive lesser medical care. It is therefore clear that these amendments were not about informed consent. If these amendments were about ensuring that physicians are allowing pregnant women to make a truly informed decision about abortion, there would be no exceptions.

But there are exceptions; and because there are exceptions, it appears that these amendments were designed to make women seeking abortions suffer and to shame women into forgoing the abortion entirely. It seems clear that the drafters created these exceptions because they believed that victims of rape and incest, minors, and women with abnormal fetuses have suffered enough already. The fact that the exceptions to these amendments were so plainly designed to prevent such further suffering necessarily disproves the argument that the amendments were designed to ensure informed consent.

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Upon remand, the district court voiced its own doubts about how the amendments could possibly strengthen informed consent.[11] The court further stated that "[t]here can be little doubt that [the amendments are] an attempt by the Texas Legislature to discourage women from exercising their constitutional rights by making it more difficult for caring and competent physicians to perform abortions."[12] Making clear its disdain for the regulation and the court of appeals' decision, the court affirmed its continued belief that the requirements imposed by the amendments are impermissible.[13] Despite this, the court, noting its hands were tied by the decision of the court of appeals, rather begrudgingly granted summary judgment for the defendants.[14]

Now where does this leave us? Before its passing, Governor Rick Perry made Texas House Bill 15 a top priority.[15] He proclaimed, "This important sonogram legislation ensures that every Texas woman seeking an abortion has all the facts about the life she is carrying and understands the devastating impact of such a life-changing decision."[16] As such a staunch supporter of the bill, Governor Perry should have known that the exceptions contained in the amendments necessarily ensured not "every Texas woman" would have "all the facts." So why the misrepresentation? Because Governor Perry knew that by signing this bill he appeased his more conservative supporters, and that by declaring it was all done in the name of health care, he appeased his more liberal supporters as well.

We have come to a point where women's health care is used as a tool for political gain. Laws are passed with blatant disregard for both the medical opinions of the physicians who will be forced to follow them and for the needs and rights of the women who will be deeply affected by them.[17] As a country—as a society—we must take a stand. We must learn to recognize the difference between that which is purely moral legislation and that which has true medical benefit. We must not allow ourselves to be manipulated into thinking a law is about health care when it is not. And most importantly, we must hold politicians answerable for the laws they support and for why they really support them. They are playing a political game with someone else's rights. It is time we held them accountable for that.

[1] Jennifer Y. Seo, *Raising the Standard of Abortion Informed Consent: Lessons to Be Learned from the Ethical and Legal Requirements for Consent to Medical Experimentation*, 21 Colum. J. Gender & L. 357, 357 (2011) (stating that "[i]n the aftermath of *Planned Parenthood of Southeastern Pennsylvania v. Casey*," decided in 1992, "state legislatures have restricted access to abortions by regulating the informed consent process.").

[2] *See id.* at 358, 360 (noting that abortion statutes mandating disclosure of information "not only go beyond what is required for other medical procedures, but also include information that is inaccurate, incomplete, or irrelevant to the particular abortion procedure to be performed" and that "while supposedly required in order to ensure informed consent, many of the abortion disclosure requirements in fact block informed consent by preventing autonomous decision-making.").

[3] *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 108-109 (1973) (stating "[t]he traditional description of state police power does embrace the regulation of morals as well as the health, safety, and general welfare of the citizenry.").

[4] *Texas Med. Providers Performing Abortion Services v. Lakey,* 667 F.3d 570, 573 (5th Cir. 2012).

[5] Tex. Health & Safety Code Ann. § 171.012(a)(4)(C) (West 2011).

[6] Tex. Health & Safety Code Ann. § 171.0122(d)(1)-(3) (West 2011).

[7] *Texas Med. Providers Performing Abortion Services v. Lakey,* 806 F.Supp.2d 942, 947-48 (W.D. Tex. 2011).

[8] *See id.* at 976 (agreeing with plaintiffs' argument that this "compelled speech" requirement was an unconstitutional violation of the First Amendment).

[9] *Lakey,* 667 F.3d at 584.

[10] *Id.* at 573.

[11] *Texas Med. Providers Performing Abortion Services v. Lakey,* No. A-11-CA-486-SS, 2012 WL 373132, at *2 n.5 (W.D. Tex. Feb. 6, 2012) (questioning "how a pregnant woman's informed consent, [the amendments'] nominal goal, is promoted by requiring 'the physician who is to perform the abortion' to personally perform many of the mandated acts. If the [amendments are] truly designed to inform women, and not simply to make abortions time- and cost-prohibitive for hospitals and clinics alike, it seems counter-productive to artificially limit the number of medically qualified people who can provide the relevant information. Informed consent requirements exist to protect the rights of patients, and to honour their autonomy, not to provide states with an excuse to impose heavy-handed, paternalistic, and impractical restrictions on the practice of medicine.").

[12] *Id.* at *5.

[13] *See id.* (noting that the "single purpose of the statute" is to "limit the number of competent physicians who are willing to perform abortions.").

[14] *See id.* at *6 (stating that, regardless of its own opinion, the District Court is required to defer to the Court of Appeals' decision).

[15] Laura Bassett, *Rick Perry Signs Mandatory Sonogram Bill, Center for Reproductive Rights Retaliates,* Huffington Post (May 25, 2011, 1:18 PM), http://www.huffingtonpost.com/2011/05/25/rick-perry-sonogram-bill-center-for-reproductive-rights-retaliates_n_866811.html (explaining Governor Perry made the Bill an emergency measure).

[16] *Id.*

[17] Chinué Turner Richardson & Elizabeth Nash, *Misinformed Consent: The Medical Accuracy of State-Developed Abortion Counseling Materials*, 9 Guttmacher Pol'y Rev. 6, 11 (2006), http://www.guttmacher.org/pubs/gpr/09/4/gpr090406.pdf (stating that "[o]ur analysis of state abortion counseling laws and materials reveals that policymakers and public health officials frequently disregard the basic principles of informed consent in favor of furthering a highly politicized antiabortion goal.").